Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

DOUGLAS F. DUSTIN,

Petitioner,

- vs -

ANA M. RAMIREZ-PALMER, WARDEN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether this Court should grant the petition for a writ of certiorari to determine whether the Ninth Circuit erred in finding it was not contrary to or an unreasonable application of the Court's Fifth Amendment case law to allow jailhouse psychiatrists who examined Petitioner for the purpose of determining if he was a suicide risk to opine on Petitioner's mental state for the prosecution and to testify to unwarned statements Petitioner made about the offense after invoking his rights to remain silent and to counsel?

II.

Whether this Court should grant the petition for a writ of certiorari to determine whether the Ninth Circuit erred in finding it was not contrary to or an unreasonable application of the Court Sixth Amendment case law to find Dustin's right to counsel was not violated when he was interviewed by jailhouse psychiatrists without notice to or an opportunity to consult with his attorney?

III.

Whether this Court should grant the petition for a writ of certiorari to determine whether the Ninth Circuit erred in finding Petitioner knowingly waived his right to a trial by jury when his waiver was based on an agreement the trial court would consider all evidence from prior trials and proceedings, and some of the evidence was missing?

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Petitioner, Douglas F. Dustin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 27, 2003.

OPINION BELOW

On June 27, 2003, the Ninth Circuit filed an unpublished opinion affirming the district court's denial of Dustin's motion for relief under 28 U.S.C. § 2254. See Appendix.[1] A petition for rehearing and suggestion for rehearing en banc was filed. On September 17, 2003 the petition was denied.

JURISDICTION

On September 17, 2003, the Court of Appeals for the Ninth Circuit denied Dustin's petition for rehearing and suggestion for rehearing en banc following the June 27, 2003 denial of his application under 28 U.S.C. § 2254. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

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[1] A copy of the Opinion is attached hereto in the Appendix. Dustin v. Ramirez-Palmer, No. 02-56029, United States Court of Appeals for the Ninth Circuit, 2003 U.S. App. LEXIS 13246 (June 27, 2003)

> forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

28 U.S.C. §2254(d)

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ---

(1) resulted in a claim that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;...

STATEMENT OF THE CASE

A. Statement Of The Offense And Arrest

On September 13, 1987 at about 7:15 p.m. Petitioner Douglas Dustin, a respected dentist with two offices in the Los Angeles area, shot and killed his estranged wife, Heidi Dustin.

Dustin had a history of clinical depression dating back to 1968. In March 1985, Douglas Dustin separated from Heidi after 24 years of marriage. In April 1985, consistent with earlier diagnoses, Dustin was again diagnosed with major depression. Following his separation from his wife, over the next two years, Dustin became increasingly agitated, depressed and obsessive. By then Heidi was romantically involved with Karl Fabritz. Karl Fabritz had been a mutual friend of the couple who had previously assisted them in training their dogs. Dustin was hospitalized for 10 days in October 1985 as a suicide risk. His guns were removed from his home. On October 4, 1986 Dustin set Fabritz's vehicle on fire in the parking lot of a restaurant where Fabritz and Heidi were dining. On May 17, 1987 Dustin drove to La Jolla, California to confront Heidi about her relationship with Fabritz. Driving at speeds of over 90 miles per hour, he lost control and crashed his automobile, in an apparent suicide attempt.

On September 3, 1987 Dustin purchased a .45 caliber handgun. Ten days later, on September 13, 1987 at about 7:15

p.m. Dustin shot and killed Heidi Dustin.

Early in the morning of September 14, 1987 Dustin, accompanied by his attorney, Patrick Murphy, surrendered to San Diego police. Murphy told police he was Dustin's attorney and was asserting Dustin's Fifth and Sixth Amendment rights. His attorney elicited a specific promise that no one would interview Dustin without his presence.

That evening Dustin was taken to a San Diego County Mental Health facility after telling jail personnel during a routine intake interview he was contemplating suicide. Psychiatrist Lee Bowlus performed mental status and psychiatric examinations to evaluate the suicide risk 'to make sure [petitioner did not] try to kill [himself] while in custody.' Bowlus determined Dustin was a suicide risk.

The next morning Dustin was evaluated by John Maloy, a psychologist and chief of Forensic Mental Health Services for San Diego County in a county jail 'safety cell,'[2] who confirmed the suicide risk determination.

On September 16, 1987 Dustin was examined by another psychiatrist, Ansar Haroun, to determine whether Dustin had a psychiatric disorder and whether he was suicidal. Within ten minutes he concluded Dustin did not have a psychiatric disorder, but was suicidal and ordered him

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[2] Testimony indicated a "safety cell" or "G cell" is an individual room with rubberized walls and ceilings and floors so a person is safe when they are in there."

transferred to the Psychiatric Security Unit. [3]

Dustin's attorney was neither given notice of, or present for the interviews on September 14, 15 and 16, 1987. During the interviews, allegedly to determine his risk for suicide, Bowlus, Maloy and Haroun elicited incriminating statements with questions that far exceeded the scope of that evaluation, including questions about the offense. The three saw Dustin a total of 40 minutes, 10 minutes and 20 minutes, respectively. There is no evidence any of the three considered other sources of information or reports concerning Dustin's mental history or state of mind.

In an affidavit attorney Patrick Murphy declared at the time of Dustin's self surrender he advised arresting San Diego Police officers as follows:

> I was Dr. Dustin's lawyer and that I would be his lawyer for all purposes. On Dr. Dustin's behalf, as his counsel, in his presence and with his consent, I advised San Diego Police officers that Dr. Dustin was invoking his right to remain silent and to counsel. I elicited from San Diego police officers a specific promise that no one would interview my client, Dr. Dustin, unless it was in my presence as his attorney; and I did not receive notice of the

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[3] Over the course of the following proceedings, Dustin spent seven years confined in the Psychiatric Security Unit of the San Diego County jail, the longest residence there of any inmate in the history of the jail. Jail psychiatrists Lloyd Droske and Benjamin Bensoul diagnosed Dustin as suffering from major depression with psychotic features.

questioning of my client, Dr. Douglas Dustin, by jail psychiatrist and psychologist on September 14, 15, and 16, 1987. I was not present during questioning of my client, Dr. Dustin, by jail psychiatrist and psychologist following his arrest on September 14, 1987.

B. State Court Proceedings

On November 25, 1987 the District Attorney of San Diego filed an information charging Dustin with murder in violation of California Penal Code § 187, committed by personal use of a firearm within the meaning of California Penal code § 12022.5. Dustin pled not guilty on December 14, 1987. On January 27, 1988 Dustin withdrew his plea of not guilty and entered a plea of not guilty by reason of insanity.

Proceedings in Dustin's case were suspended three times due to doubts about Dustin's competence.

On February 14, 1989, the guilt phase of Dustin's first trial commenced. On February 21, 1989 the Court declared a doubt as to Dustin's mental competency to stand trial. The jury trial proceeded on February 23, 1989 after Dustin was declared competent to stand trial. His counsel moved to exclude the testimony of the jail house doctors.

During the guilt phase two psychiatrists and a psychologist appointed by the Superior Court to evaluate Dustin's sanity at the time of the offense testified. Two more psychiatrists and one psychologist hired by the defense to conduct similar evaluations also testified. All six

independently found that Dustin was suffering from psychotic major depression and was legally insane at the time of the offense. Specifically, Meredith Friedman, a clinical psychologist who met with Dustin at the San Diego County Jail in the fall of 1987 testified Dustin suffered from psychotic depression. Martin Blinder, a psychiatrist who examined Dustin in the fall of 1987 testified in September and October 1987 Dustin suffered from a major depressive disorder, complicated by alcohol abuse and a probable dissociative episode layered on obsessive-compulsive personality. Richard Rappaport, who first examined Dustin on September 29, 1987 testified that on the day of Heidi's death Dustin was experiencing an ongoing depression and an acute psychotic break with a dissociative reaction. Psychiatrist Dean Archer, M.D., Sanford Wolf, M.D. and psychologist Thomas MacSpeidin, all appointed by the Superior Court to conduct medical examinations to determine whether Dustin was sane or insane at the time of the offense, each independently found that Dustin was suffering from major psychotic depression and was legally insane at the time of the shooting. Archer and Wolf testified at the guilt phase of the proceedings. MacSpeiden testified in the sanity phase of proceedings.

Pursuant to the dictates of People v. Danis (1973) 31 Cal.3d 782, 786-787,[4] prior to trial the prosecution selected Dr. David Braff, M.D., to examine petitioner. Dr. Braff conducted a detailed and thorough examination of Dustin prior to trial. He also reviewed reports produced by Dustin's experts, transcripts of testimony and statements from Dustin's

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[4] "[A] trial court possesses the inherent power to order a defendant who has imposed a defense of insanity or of diminished [actuality] to submit to an examination of a psychiatrist selected by the People." (Id. at p. 786)

sons. The prosecution chose, however, not to use Dr. Braff during its guilt phase.[5]

Dustin did not testify. However, in rebuttal the prosecution called the three jailhouse psychiatric professionals (Bowlus, Maloy and Haroun) who each testified Dustin was sane at the time of the murder. In addition to opining on Dustin's mental state at the time of the murder, the men testified to statements Dustin made about the offense. For instance, Bowlus testified Dustin stated 'he killed his wife,' and he had been planning to kill her because she had been having an affair for about two years prior to her death and he was very jealous and upset about it. He also testified Dustin told him he had planned to kill himself but did not for the following reasons:

> What he told me was that he came down to La Jolla, and he and his wife had a big fight, and this culminated in him shooting her, and he ended up — from what he said, he shot her in the street, and there was a big commotion; and at that point, he got in his car and drove away, and he drove home, and on the way home he said he was thinking he was just going to go home to Pasadena and kill himself with his gun; and when he got home, his son was home,

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[5] Perhaps because the prosecution recognized Dr. Braff was not a strong witness for the state. During direct testimony in the sanity phase, Dr. Braff testified he found Dustin depressed, yet not psychotic, and he found "no solid evidence that [Dustin] was psychotic." However during cross-examination, in confusing testimony, he equivocated: "So in general I think he was psychotic, although I would separate psychosis as poor reality testing from psychotic symptoms of hallucinations and delusions. So really trying to answer the questions of hallucinations and delusions apart from gross impairment, he was grossly very impaired."

> and his son realized that his father was quite upset and talked him out of it, and that's what prevented him from killing himself."

Meloy testified Dustin stated his 'desire to kill wife's boyfriend,' and '[Dustin] killed his wife because she was an adulterer but now regrets it because he killed the one he loved.'

On March 17, 1989 the jury found Dustin guilty of murder in the first degree and found it true that he had personally used a firearm. On March 20, 1989 the sanity phase commenced. On May 24, 1989 a mistrial was declared after the jury was unable to reach a jury verdict. On May 24, 1989 the court ordered an examination pursuant to California Penal Code § 1368 to determine whether Dustin was mentally competent to stand trial.

More than three years later, the sanity phase of Dustin's trial proceedings resumed. On September 14, 1992, Dustin moved to exclude the testimony of the jailhouse doctors as to their opinions regarding Dustin's mental state at the time of the offense and Dustin's statements during the interviews that led to those opinions. The motion was denied. On September 16, 1992 the second sanity phase of the proceedings commenced. The same five experts who testified for the defense in the guilt phase and Dr. MacSpeiden testified for Dustin in the sanity phase. The People presented testimony from Dr. Braff and Bowlus, Meloy and Haroun, the latter three testifying Dustin was not psychotic when they examined him shortly after his arrest. On October 16, 1992 a mistrial was declared after the jury was unable to reach a verdict.

On March 26, 1993 Dustin's motion for a mistrial after the guilt phase of the trial was denied. Dustin filed a Petition for Writ of Mandate to the California Court of Appeal, Fourth Appellate District, Division One in Case No. 018799, which was granted on November 22, 1993 resulting in entry of a mistrial as to the guilt phase of trial.

On April 25, 1994, criminal proceedings were suspended pursuant to California Penal Code § 1368. On July 20, 1994 Judge Terry Knoepp ruled Dustin was mentally incompetent to stand trial and committed Dustin to Patton State Hospital.[6] During his stay at Patton State Hospital Dustin's diagnosis of major depression with psychotic symptoms was confirmed by his treating physicians, who prescribed Nardil. Nardil is used only as a last resort treatment because it is a potentially toxic medication that interacts with common foods and other medications in potentially fatal ways. With this medication, Dustin finally obtained some relief from the psychotic delusions, and was found competent on August 23, 1995. On October 5, 1995 he was discharged from Patton State Hospital and returned to court for further proceedings.

The San Diego County Sheriff's Office ignored specific instructions from Patton and the court's competency examiner.[7] Dustin was housed in a county jail, instead of the

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[6] It should be noted the entire proceedings of this competency determination are missing from the transcripts.

[7] Patton State Hospital's Medical Director, Ronald Hattis issued an opinion "Dr. Dustin is presently competent to stand trial. ... [Dustin] will need continued treatment in a hospital or treatment facility in order to maintain competence to stand trial or

community mental health facility doctors had said was necessary in order to maintain his competency. Dustin informed his trial counsel he was not receiving the medical diet required to avoid potentially fatal combinations with the Nardil, he was unable to tolerate the physical and emotional stress caused by jail custody, and the commute for court proceedings was beyond his capacity to endure. On October 11, 1995 Judge Joan Weber ordered a Penal Code § 1368 (competency) trial be continued to October 17, 1995. On October 17, 1995 Judge Revak did not conduct a competency hearing. Instead, he secured Dustin's waiver to his right to trial by jury and the right to be present at trial. Dustin also agreed the trial would be based on the transcripts of the two prior jury trials. This waiver was secured after his counsel advised him if he waived jury trial and consented to a bench trial the judge would return him to Patton State Hospital while the trial was conducted in his absence. However, if but if he opted for trial by jury he would remain at the county jail and forego psychiatric treatment during the entire period of the trial.

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that placing the person in a jail environment would create a substantial risk that the person would again become incompetent to stand trial before criminal proceedings could be resumed." The Superior Court's appointed examiner also found Dustin competent, but stated "[D]uring any subsequent trial, it would be necessary to house Dustin in a private facility such as Harbor Hospital or another appropriate facility in order to appropriately treat him since staff at the PSU would not be equipped to do so based on his dietary and medication needs... It is also likely to be helpful that psychotherapeutic services on an individual basis be available to the patient during subsequent legal proceedings. As stated above, he will require inpatient psychiatric services in the community."

On October 17, 1995, the petitioner's next appearance in court, Judge Revak did not conduct a Cal. Penal Code §1368 hearing or receive any input from any experts regarding petitioner's mental state. The examination of petitioner was slight. 'How are you feeling this morning?" . . . "Do you understand . . . "' On that date the petitioner waived his right to a trial by jury and the right to be present at the trial. Before securing Dustin's waiver Judge Revak advised him of his right to a jury trial and stated:

> Your attorney has indicated that it is his desire and your desire to waive your right to a jury trial and to submit the matter based on all the testimony that has been transcribed and reported prior to proceedings in front of Judge Meloche and in front of me; however, preserving your right to make objections, that is, your right to make objections to questions in answers, the District Attorney's right to make objections to questions and answers. Do you understand that?" . . . "Do you understand that it is anticipated that there will be no additional testimony, that is live testimony in this proceeding?" . . . "In other words my decision will be based only on the allowable evidence from the prior proceedings, trials.

Petitioner agreed to waive his right to a jury trial and all the associated rights based on the agreement Judge Revak would make a decision based on all the testimony from the two prior trials and all the allowable evidence from prior proceedings.

The trial court convicted Dustin at a bench trial and

found he was sane at the time of the murder.

Following Dustin's conviction he appealed. On April 19, 1999 the California Court of Appeal denied his appeal in which he argued the admission into evidence of the testimony of the jail psychologist and two jail psychiatrists violated Dustin's Fifth and Sixth Amendment rights.

A Petition for Review by the California Supreme Court was denied on July 21, 1999.

After the matter was submitted to Judge Revak and after the appeal, it was discovered that substantial portions of the reporter's transcripts constituting testimony heard by Judge Meloche in both the guilt and sanity phase which Judge Revak would not have previously heard are missing from the record. The Court Reporter's Certification indicating that the transcripts had been lost, destroyed or not transcribed from notes appear as exhibits in and attached to the original Petition for Writ of Habeas Corpus.

These missing transcripts concern the following aspects of the case:

(1) A bench conference concerning the testimony of Richard Rappaport, M.D., a psychiatric expert retained by defense counsel to conduct a psychiatric evaluation of the Petitioner.

(2) Portions of the testimony and a bench conference concerning the testimony of Dean Archer, M.D., a psychiatrist expert selected and appointed by the Superior Court to examine the Petitioner for the purpose of determining the Petitioner's sanity at the time of the offense.

(3) Portions of the testimony and bench conferences concerning the testimony of David Braff, M.D., a psychiatric expert retained by the District Attorney's Office to conduct a psychiatric evaluation of the Petitioner regarding the Petitioner's sanity at the time of the shooting

(4) A portion of the testimony of Marvin Warman, M.F.C.C., a marriage, family and child counselor and a pastor, who provided the Petitioner with pastoral counseling in the nine months leading up to the shooting.

(5) Bench conferences and all of the bench testimony of Pastor Warman concerning the admission of audio cassette tapes into evidence.

(6) Transcriptions of the tapes mentioned in paragraph 5 above, which tapes were played to the jury but never entered into evidence, and so were unavailable for review by Judge Revak or the appellate attorneys. A review of the transcripts of the tapes of the counseling sessions with Marvin Warman are particularly important in that they show the Petitioner's mental state from May 1987 up to the week prior to the homicide.

C. Federal Habeas Review

On July 20, 2000 Dustin filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of California in Dustin v. Ramirez-Palmer, 00-cv-01441. The district court had jurisdiction under 28 U.S.C. § 2254. On August 1, 2000, the Magistrate Judge

ordered a response. September 26, 2000, the Answer to Petition for Writ of Habeas Corpus was filed. On October 30, 2000, the Traverse by Petitioner was filed along with a Memorandum. On February 5, 2001 Magistrate Judge Robert T. Benitez. filed a Report and Recommendation for Denial of Petition for Writ of Habeas Corpus. See Appendix. On March 2, 2001, Dustin filed Objections to the Report and Recommendation. On March 18, 2002, an Order was entered by Judge M. J. Lorenz overruling the Petitioner's Objections to the Report and Recommendation and adopting in its entirety the Report and Recommendation. The Order denied the Petition for Writ of Habeas Corpus. See Appendix. On April 16, 2002 a Notice of Appeal was entered. On April 18, the Application for Certificate of Appealability was filed. On June 7, 2002, the Court granted Petitioner's Application for Certificate of Appealability as to all five claims presented in the Petition On June 27, 2003 the Ninth Circuit affirmed the district court's denial of Dustin's Petition for Writ of Habeas Corpus. Dustin v. Ramirez-Palmer, 2003 U.S. LEXIS 13246 (June 27, 2003). In pertinent part the court stated:

> The state appellate court determined that the jailhouse interviews by the two psychiatrists and the psychologist were conducted in response to Dustin's suicide threats and not to provide law enforcement with incriminating information. Given that Dustin places his mental state in issue at trial, it was not an unreasonable application of clearly established federal law to allow the State to use these interviews to rebut Dustin's sanity defense. *See, e.g. Penry v. Johnson, 532 U.S. 782, 794-95, 150 L. Ed. 2d 9, 121 S. Ct. 1910 (2001).*

Id. at * 3. The Ninth Circuit Court of Appeals further stated:

> Dustin also contends that, because portions of the record were missing when the court conducted the bench trial, his waiver of a jury trial was invalid. We disagree. The missing portions of the record were inconsequential. Dustin received the bench trial to which he was entitled and which he sought by his jury trial waiver. He may have misapprehended how the bench trial would be conducted, but a court is permitted to accept waivers of "various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *United States v. Ruiz*, 536 U.S. 622, 630-31 (2002)(collecting cases).

On September 17, 2003. In relevant part the Dustin's Petition for Rehearing and Suggestion for Rehearing En Banc was denied. This Petition for Certiorari follows.

REASONS TO GRANT THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DECIDED AN ISSUE OF PETITIONER'S FIFTH AMENDMENT RIGHTS IN A WAY THAT CONFLICTS WITH AND IS AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT

A. Nature of the Errors

Under Supreme Court Rule 10 a petition for writ of certiorari will be granted for compelling reasons, including where a state court or a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Ninth Circuit Court of Appeals affirmed the denial of Dustin's habeas petition on Fifth Amendment grounds. Specifically it upheld the district court's finding that admission of the jailhouse psychiatrists' and psychologist's testimony was not a decision that was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.' Dustin v. Ramirez-Palmer, 2003 U.S. App. LEXIS 13246 (June 27, 2003); see 28 U.S.C. § 2254 (d); Early v. Packer, 537 U.S. 3 (2002) (per curiam). However, in reaching its decision the Ninth Circuit upheld the state and district courts' unreasonable application of Penry v.

Johnson, 532 U.S. 782 (2001). The Ninth Circuit Court of Appeals also upheld a decision that conflicts with and is an unreasonable of the Court's Fifth Amendment decisions in Miranda v. Arizona, 384 U.S. 436 (1966), Edwards v. Arizona, 451 U.S. 477, (1980), Estelle v. Smith, 451 U.S. 454 (1981) and their progeny.

B. The Ninth Circuit Court of Appeals Decision Was Contrary To And An Unreasonable Application Of TheCourt's Fifth Amendment Decisions

1. The Fifth Amendment Is Implicated During Pre-trial Custodial Psychiatric Examinations And Dustin Had Invoked His Rights

In Miranda v. Arizona, 384 U.S. 436 (1966) this Court determined the Fifth and Fourteenth Amendments of the United States prohibition against compelled self-incrimination requires that custodial interrogations be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of counsel.

In Edwards v. Arizona, 451 U.S. 477, 484-85 (1980) the Supreme Court held that an accused person in custody who has 'expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' Id.

The Ninth Circuit Court of Appeals never addressed

Edwards, or considered the significance of the fact Dustin invoked his rights. Neither does the opinion address the significance of the fact Dustin had invoked his right to counsel, as well as his right to remain silent. Clearly if Dustin had had an opportunity to consult with counsel he could have either refused to answer the jailhouse psychiatrists questions, or at least limited the use only to determine Dustin's suicide risk.

In Estelle v. Smith,451 U.S. 454, 465 (1981) the Court held a defendant's answers to questions during a pretrial psychiatric exam ordered by the Court, including answers to questions about the crime with which he was charged, were testimonial and entitled to the protection of the Fifth Amendment. The Court reasoned 'the fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment.' The Supreme Court held 'the Fifth Amendment privilege ... is directly involved here because the State used as evidence against [the defendant] the substance of his disclosures during the pretrial psychiatric examination.' Id. at 464-65 (emphasis added.). The Court further stated:

> When [at trial the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution ... his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting.

Id. These decisions, none of which were addressed by the Ninth Circuit Court of Appeals, should have been the

framework of the decision. Clearly if Dustin had made statements about the offense or about his mental state to a police officer while in custody, there would have been no question the statements were inadmissible unless Dustin testified. There is no reason the statements should have become admissible under these circumstances because of the fortuity they were made to doctors during a custodial interview.

2. The Fifth Amendment Is Not Implicated By The Purpose For Which Statements Are Taken, But By The Content Of The Statements And The Uses To Which They Are Put.

The Ninth Circuit Court of Appeals decided it was permissible for the state court to permit the jailhouse doctor's testimony because the interviews were not conducted for the purpose of providing law enforcement with incriminating information but to evaluate Dustin's suicide risk. It relied solely on Penry, 532 U.S. 782 to reach this conclusion. This is an unreasonable application of and contrary to federal law as stated by the Court in Penry. The Fifth Amendment analysis does not turn on the purpose of the interview, but, rather, whether the information obtained from the interview relates to the charged offense, and is used to assist the prosecution.

In Penry the defendant who had been found guilty in a 1980 capital murder trial was facing a capital sentencing. A psychiatric report had previously been prepared by a Dr. Peebles at the request of defendant's former counsel to determine the defendant's competency to stand trial in an unrelated 1977 rape case. Id. at 794. During the penalty

phase of Penry's 1980 capital murder trial his counsel put on an expert who testified to Penry's future dangerousness, and on cross-examination the expert admitted he had reviewed the 1997 psychiatric report while preparing his testimony. Over Penry's objection, the expert then read portions of the 1997 report that strongly supported a finding of future dangerousness.

It was crucial to the Court's decision in Penry 'that when Dr. Peebles interviewed Penry, Peebles was not acting as an agent for the State in order to gather evidence that might be used against Penry.' 532 U.S. 782 at 793. In Penry the psychiatric evaluation took place before the offense. The court reasoned that at the interview two years before the murder, Penry had not been 'confronted with someone who was essentially an agent for the State whose function was to gather evidence that might be used against him in connection with the crime for which he was incarcerated.' Id. at 791 (emphasis added).

In its analysis of 'an agent for the State' the Court distinguished Estelle. In Estelle, the psychiatric exam had been ordered by the court to determine Estelle's competence. However, as the Court held:

> When [at trial the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution ... his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting.

Id. at 464-65; See, also, Pennsylvania v. Muniz, 496 U.S.

582, n.13 (1990). (Although an arresting officer may not have had an investigatory interest in asking a DUI suspect to state the date of his sixth birthday the question was reasonably likely to elicit an incriminating response and the response was testimonial).

The Ninth Circuit Court of Appeals erred because it was not the intention of the jailhouse doctors' or the purpose of the interviews that should have determined the admissibility of the unwarned, uncounseled statements. Rather, the relevant inquiry is whether the unwarned s statements were related to the offense and later used by the prosecutor against the defendant in connection with the offense.

3. It Was An Unreasonable Application Of Penry v. Johnson 532 U.S. 782 (2001) To Find It Permitted The Jailhouse Psychiatrists And Psychologist To Testify To Statements Dustin Made About The Offense

The Ninth Circuit unreasonably applied Penry to a case where the jailhouse psychiatrists and psychologist did not limit their testimony to opining on Dustin's mental state, but also testified to incriminating statements made by Dustin about the offense for which he was incarcerated.

The Court did not address the significance of testimony regarding incriminating statements about the offense in Penry because when Penry was interviewed in 1977, he had not committed, and therefore could not make incriminating statements about, the 1980 offense. However, the issue was addressed in Estelle, 451 U.S. at 464 and n. 9

and Buchanan v. Kentucky, 483 U.S. 492, 414 (1987)

In Estelle, as here, the psychiatric testimony included a detailed recitation of incriminating statements made by the defendant. Accordingly, the Court concluded 'the Fifth Amendment privilege ... is directly involved here because the State used as evidence against the defendant the substance of his disclosures during the pretrial psychiatric examination.' Id. At 464-465 (Emphasis added.).in Estelle the statements were protected by the Fifth Amendment. 451 U.S. at 464 and n.9.

By contrast, in Buchanan v. Kentucky, 483 U.S. 402, 414 (1987) the Court upheld a trial court decision to admit psychiatric testimony to rebut the defendant's defense of extreme emotional disturbance. Id. at 423. However, evidence was limited to portions in a report 'in which the psychiatrist had set forth his general observations about the mental state of petitioner, but had not described any statements by petitioner dealing with the crimes for which he was charged.' Id.

It was significant to the Court in Penry, and the Ninth Circuit Court of Appeals decision in this case, that the defendant placed his mental condition at issue. However, assuming, *arguendo,* that once Dustin placed his mental state at issue some psychiatric evidence from the jail house interviews might have been proper, under Estelle and Buchanan that evidence should have been limited to testimony that did not include recitation of incriminating statements by Dustin about the offense or opinions that assumed the truthfulness of those statements.

Further, the decision in Buchanan was supported by

the rationale that where the defendant has placed his mental status at issue and does not take the stand, it is not fair for the defendant to deny the government access to other psychological evidence to rebut his defense. Here, however, that was not the case. Pursuant to a court order, and with the advice of counsel, Dustin submitted to psychiatric evaluations for the express purpose of determining his sanity. The Court appointed two psychiatrists and one psychologist (all of whom concluded Dustin was suffering from psychotic major depression and was legally insane at the time of the offense). Dustin also submitted to an evaluation by a psychiatrist retained by the prosecution, who it decided not to call at the guilt phase of the trial, and at the sanity phase equivocated in his testimony, finding Dustin was suffering from psychotic major depression and was grossly impaired, though not to the point of insanity at the time of the shooting. The government was also able to cross-examine the two psychiatrists and one psychologist who testified for the defense.

Clearly in the absence of the jailhouse doctors' interviews and testimony the prosecutor would not have been denied access to Dustin's mental state. Six experts (three neutral appointees of the court and three defense experts) testified to Dustin's mental state. The prosecutor should not have been permitted to rely on psychiatric testimony based on Dustin's uncounseled, unwarned statements after he had invoked his Miranda rights in an interview conducted without notice to his counsel that the interview was being conducted, or of the scope of that interview.

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4. The Court's Distinguishing Treatment Of Estelle v. Smith 451 U.S. 454 (1981) In Penry v. Johnson, 532 U.S. 782 (2001) Reinforces The Court of Appeals' Error

In deciding Penry, the Court pointed to several factors distinguishing the case from Estelle v. Smith. 532 U.S. at 794. It noted that in Penry defense counsel had requested the psychiatric interview. Penry, 532 U.S. at 794. By contrast, in Estelle, it was the court that had called for the examination. Similarly, here, Dustin did not seek the jailhouse interviews, and, in fact specifically objected to them in advance. In Penry, the objectionable testimony only resulted when the prosecutor cross-examined Penry's own expert. By contrast here, as in Estelle, the disputed testimony was introduced by the prosecution, and was not related to Dustin's presentation. In Penry, the defense requested the examination at issue. Id. Here, as in Estelle, the examination was conducted without notice to or with the benefit of the advice of counsel. In Penry, the offense had not yet been committed at the time of the offense, id. , while in Estelle, as here, the defendant had already committed the offense and the issues of his interrogation were already clear. The many ways in which this case is similar to Estelle and dissimilar to Penry is evidence the Court of Appeal upheld an unreasonable application of thedecisions.

II.
THE COURT SHOULD GRANT THE WRIT BECAUSE THE NINTH CIRCUIT COURT OF APPEALS DECISION SUSTAINS A DECISION THAT UNREASONABLY PERMITS THE PROSECUTOR TO CIRCUMVENT THE SIXTH AMENDMENT

The Court has emphasized the importance of the

Sixth Amendment right to counsel in deciding whether to submit to psychiatric examinations and in determining their scope. For instance, in Estelle, the Court found a Sixth Amendment violation because 'respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.' 451 U.S. at 471. Further, as the Court stated in Powell v. Texas, 492 U.S. 680 (1989):

> While it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to required the state to provide counsel with notice before the examining the defendant concerning future dangerousness. Thus if a defendant were to surprise the prosecution on the eve of trial by raising an insanity defense to be supported by psychiatric testimony, the court might be justified in ordering a continuance and directing that the defendant submit to examination by a state-appointed psychiatrist. There would be no justification, however, for also directing that defense counsel receive no notice of this examination.

Id. ; see also, Satterwhite v. Texas, 486 U.S. 249, 292 (1988) (requiring advance notice to defense counsel of psychiatric examination); Buchanan, 483 U.S. at 424 (finding no Sixth Amendment violation where "petitioner's counsel himself requested the psychiatric evaluation by Doctor Lange. It can be assumed ... that defense counsel consulted with petitioner about the nature of this

examination)

Here, while Dustin had not been arraigned, he had been booked into the jail on serious charges and had already invoked his right to counsel. Under Estelle, Powell, Satterwhite and Buchanan the decision to submit to a psychiatric evaluation is recognized as a critical stage of the proceedings to which the right to counsel attaches. Here the prosecution should not have been permitted to circumvent Dustin's Sixth Amendment right by introducing evidence from psychiatric evaluations of which his counsel had no notice were taking place, or what there scope would be, when they had access to evidence to rebut his defense from seven psychiatric evaluations that were conducted in accordance with the right to counsel.

III.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE NINTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING AS REASONABLE THE FINDING DUSTIN MADE A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO A JURY TRIAL

In order to be valid, a jury waiver must be knowingly and voluntarily made. Brady v. Marvland, 397 U.S. 742, 748 (1970) ('Waiver of constitutional rights [including the right to a jury trial] must not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'). See also, Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Alvord v. Wainwright, 469 U.S. 956, (960 (1984).

In this case The Ninth Circuit Court of Appeals

concluded Dustin's waiver of his jury trial rights was valid because the missing portions of the record were 'inconsequential. However, two juries with the benefit of all the evidence had already hung on the issue of sanity. The Court of Appeals also held Dustin's waiver was valid because he may have 'misapprehended' how the bench trial would be conducted. It relied upon United States v. Ruiz, 536 U.S. 622, 630-31 (2002). However, Ruiz did not involve a case where a waiver was based upon an agreed upon set of facts, and then the facts were changed. When Dustin waived his jury trial rights he did not 'misapprehend' anything. The agreement was clear: the Judge was to consider all transcripts and evidence from prior proceedings. Because this was not the case, Dustin's waiver was not knowing as a matter of law.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 15 2003

No. 03 846

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

DOUGLAS F. DUSTIN,

Petitioner,

- vs -

ANA M. RAMIREZ-PALMER, WARDEN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed June 27, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOUGLAS F. DUSTIN,	)	No. 02-56029
	)	
Petitioner-Appellant,	)	D.C. No.
	)	CV-00-01441-
	)	MJL/RTB
v.	)	
	)	
ANA RAMIREZ-PALMER, WARDEN;)		
PEOPLE OF THE STATE OF	)	
CALIFORNIAEX REL. BILL	)	MEMORANDUM*
LOCKYER; ATTORNEY GENERAL	)	
OF THE STATE OF CALIFORNIA,	)	
	)	
Respondents-Appellees.	)	
	)	

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

Argued and Submitted June 3, 2003
Pasadena, California

Before: THOMPSON, TROTT, and TALLMAN, Circuit Judges.

We have jurisdiction to hear this appeal from the district court's denial of Dustin's habeas corpus petition. 28 U.S.C. § 2253. We review

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

de novo, pursuant to 28 U.S.C. § 2254, a district court's denial of a state prisoner's habeas petition. *Benn v. Lambert*, 283 F.3d 1040, 1051 (9th Cir. 2002)(citing *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999)), *cert. denied*, 123 S.Ct. 341 (2002). We presume the state court's factual determinations are correct unless the petitioner rebuts this presumption with clear and convincing evidence. 28 U.S.C. §2254(e)(1)(2000); *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001).

Because the state court's decision did not result "in a

decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," we deny Dustin's petition. See 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 123 S.Ct. 362, 364 (2002) (per curiam).

The state appellate court determined that the jailhouse interviews by the two psychiatrists and the psychologist were conducted in response to Dustin's suicide threats and not to provide law enforcement with incriminating information. Given that Dustin placed his mental state in issue at trial, it was no an unreasonable application of clearly established federal law to allow the State to use these interviews to rebut Dustin's sanity defense. See, e.g., *Penry v. Johnson*, 532 U.S. 782, 794-95 (2001).

The state trial court did not err in failing to order an additional competency examination or hold a competency hearing prior to Dustin's waiver of his right to trial by jury. Dustin had been determined competent just two months prior

to his jury trial waiver. He submitted no evidence that his competency had deteriorated in the interim, nor did his behavior raise any doubt that he was competent to stand trial or waive his constitutional rights. *See Sandgathe v. Maass*, 314 F.3d 371, 379 (9th Cir. 2002); *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991).

Dustin's counsel was not ineffective for failing to request an additional competency examination or hearing before Dustin waived his right to a jury trial. There was no basis for such a request.

Dustin's remaining claims of ineffective assistance of trial and appellate counsel also lack merit. Minor portions of the record from prior trials and proceedings were missing at the time the court conducted the bench trial, and Dustin's counsel failed to all this to the court's attention. But the only missing portions that were admissible into evidence were portions of the record of the retrial of the sanity phase of the case, and the bench trial judge had presided over that phase.

Accordingly, the omission of portions or the record, the failure of Dustin's counsel to call that omission to the attention of the bench trial court, the failure to ensure that the missing portions were produced at the bench trial, and the failure of appellate counsel to identify missing portions of the record and raise issues pertaining thereto did not prejudice Dustin. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984)("[D]efendant must show that the [alleged] deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."). Dustin fails to satisfy the prejudice prong of *Strickland.*

Dustin also contends that, because portions of the record were missing when the court conducted the bench trial, his waiver of a jury trial was invalid. We disagree. The missing portions of the record were inconsequential. Dustin received the bench trial to which he was entitled and which he sought by his jury trial waiver. He may have

misapprehended how the bench trial would be conducted, but a court is permitted to accept waivers of "various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *United States v. Ruiz*, 536 U.S. 622, 630-31 (2002)(collecting cases).

Finally, Dustin has made no showing sufficient to support his claim for an evidentiary hearing in the district court. See 28 U.S.C. § 2254(e)(2)(2000).

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOUGLAS F. DUSTIN,	)	Civil No. 00cv1441-L(BEN)
Petitioner,	)	ORDER OVERRULING OBJECTIONS AND ADOPTING REPORT AND RECOMMENDATION
v.	)	
ANA M. RAMIREZ PALMER Warden,	)	
Respondent	)	

Petitioner, Douglas F. Dustin, a state prisoner represented by counsel, has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. The Honorable Roger T. Benitez has issued a Report and Recommendation ("R&R")

recommending denial of the petition. Judge Benitez submitted the R&R to this Court pursuant to 28 U.S.C. § 636(b)(1). Petitioner has filed objections to the R&R. For the reasons discussed below, the Court **ADOPTS** Judge Benitez's R&R in full.

BACKGROUND

Petitioner was charged with first degree murder with the use of a firearm for shooting and killing his wife of 24 years. (Answer Exh. At 2.) Petitioner pleaded not guilty and denied the firearm use allegation. *Id.* Later, Petitioner withdrew that plea and entered a plea of not guilty and not guilty by reason of insanity. *Id.* On March 17, 1989, a jury convicted Petitioner of the murder charge, and found the firearm allegation to be true. *Id.* In sanity phase, a mistrial was declared when the jury was unable to reach a verdict. *Id.* A second sanity trial also resulted in a hung jury and a mistrial. *Id.*

Petitioner subsequently filed a petition for writ of mandate after the trial court denied his motion for new trial on guilt. *Id.* at 3. The appellate court granted the petition. *Id.* Prior to the commencement of the trial, the court suspended proceedings under California Penal Code section 1368 and ordered a competency hearing. *Id.* On August 23, 1995, the court found Petitioner mentally competent to stand trial. *Id.*

On October 17, 1995, Petitioner waived his right to jury trial and stipulated to have the court decide both guilt and sanity based on the prior trial transcripts. *Id.* In January 1996, the court found Petitioner guilty of first degree murder and found true the firearm use allegation. *Id.* In the sanity phase, the Court found Petitioner to be sane. *Id.* At 1,3. Petitioner was then sentenced to a total of 27 years to life in state prison. *Id.* at 1-2.

Petitioner appealed his conviction, and the California

Court of Appeal affirmed the judgment of conviction on April 19, 1999. *See id.* at 1, 18. Petitioner then filed a petition for review before the California Supreme Court, which was denied on July 21, 1999. On November 2, 1998, Petitioner filed a petition for writ of habeas corpus that was denied on April 19, 1999. on March 3, 2000, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court that was denied on the merits on June 28, 2000. Petitioner filed a second petition for writ of habeas corpus in the California Supreme Court on April 10, 2000, that was also denied on June 28, 2000. On July 20, 2000, Petitioner filed the instant petition before this Court, raising five grounds for relief.

Petitioner's first claim for relief is that his Fifth and Sixth Amendment rights were violated when statements taken by two jail psychiatrists and a jail psychologist were introduced into evidence. Petitioner's second claim for relief

is that his waiver of the right to a jury trial was invalid because he was incompetent, no recent California Penal Code section 1368 examination had taken place, and the mental competency examination under California Penal Code section 1368 as ordered by the Court had not taken place. Petitioner's third ground is that he received ineffective assistance of trial counsel. Petitioner's fourth claim is that he "did not receive the court trial upon which he conditioned his waiver of jury trial and all the concomitant rights associated with a jury trial because the trial judge did not have the entire transcripts from the two prior trials upon which to base his decision." Petitioner's final claim is that he received ineffective assistance of appellate counsel.

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DISCUSSION

The district court's role in reviewing a Magistrate

Judge's report and recommendation is set forth in 28 U.S.C. § 636 (b)(1). Under ths statute, the district court "shall make a de novo determination of those portions of the report ... to which objection is made," and may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate.' *Id.*

Petitioner has submitted several objections to Judge Benitez's R&R. The Court will address each below.

I. Objections to Background Section.

Petitioner raises several objections to the facts outlined in the R&R's Background section. He first objects to Judge Benitez's reliance upon the facts set forth in the California Court of Appeal opinion in *People v. Dustin*, No. D026025 (Apr. 19, 1999). Petitioner argues that the only issue raised in that appeal was Petitioner's Fifth and Sixth Amendment claims, and the other issues presented in petition were not addressed in that appeal or developed in any

evidentiary hearing. Petitioner's objection fails to show how Judge Benitez committed any error that would warrant habeas relief. First, as Judge Benitez noted, factual findings of both state and trial and state appellate courts are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1); *Keating v. Hood*, 191 F.3d 1053, 1069 (9th Cir. 1999), cert denied, 531 U.S. 824 (2000). Further, the facts that Judge Benitez cited in that section of the R&R relate to the procedural background leading to this petition. (*See* R&R at 1-2.) A review of the R&R reveals that Judge Benitez thoroughly considered the record in reviewing the Petition. This objection fails to identify what facts Judge Benitez erred in presuming correct, or how such presumptions undermine the R&R's conclusions.

Petitioner's other objections to the Background section are also unavailing. Petitioner simply objects to certain facts stated by Judge Benitez, but he does not

correlate these facts to any of his claims for relief. Petitioner also does not provide any argument or authority indicating why his objections show he is entitled to habeas relief. Accordingly, Petitioner's objections to the R&R's Background section are **OVERRULED.**

II. Objections Regarding First Claim of Relief: Violation of Petitioner's Fifth and Sixth Amendment Rights.

Petitioner's first claim for relief is that his Fifth and Sixth Amendment rights were violated when statement taken by two jail psychiatrists and a jail psychologist were introduced into evidence.

A. Fifth Amendment Prong.

Petitioner first objects to Judge Benitez's statement that the opinions of mental health professionals regarding Petitioner's sanity were introduced into evidence at trial over Petitioner's objections. Petitioner argues that not only were

the opinions of mental health professionals introduced into evidence, but so were Petitioner's own statements. Petitioner does not present any argument or authority to support why this objection would require this court to overrule the R&R.

Petitioner next objects to Judge Benitez's analysis that *Buchanan v. Kentucky*, 483 U.S. 402 (1987) created an exception to the rule announced in *Estelle v. Smith*, 451 U.S. 454 (1981). *Estelle* holds that the Fifth Amendment generally bars the government from subjecting a defendant to a psychiatric examination without first warning him of his rights. In analyzing Petitioner's Fifth Amendment argument, Judge Benitez noted that *Buchanan* created an exception to *Estelle*, holding that when a defendant puts his mental condition in issue, he waives his Fifth Amendment rights as to evidence of his mental condition. (R&R at 5-6).

Petitioner contends that *Buchanan's* holding is not so broad, and objects to Judg Benitez's statement that Petitioner

failed to point to any authority suggesting that the Fifth Amendment waiver recognized in *Buchanan* is as narrow as Petitioner contends. According to Petitioner, *Buchanan* found no Fifth Amendment violation because the commonwealth could not rebut the testimony of defendant's mental health witness unless it presented other psychological evidence. (Objections at 5.) In addition, Petitioner argues that the report read to the jury in *Buchanan* did not contain the defendant's statements, and the examination that took place was joined in by the defense. *Id.* Petitioner argues that because the examinations conducted by Drs. Bowlus, Meloy and Haroun were not requested by the defense, Petitioner's statements made to these doctors should not have been introduced into evidence. Petitioner contends that the state had other effective means to rebut the mental health testimony presented by the defense; in particular, the testimony of Dr. Braff, an expert retained by the prosecution.

Petitioner's objections fail to present any authority indicating that *Buchanan*'s holding is as narrow as he contends. Accordingly, his arguments for why Judge Benitez's interpretation is incorrect are unpersuasive. The United States Supreme Court and the Ninth Circuit have cited *Buchanan* for the proposition stated by Judge Benitez: that a defendant waives his Fifth Amendment privilege when he raises his mental status as a defense. *See, e.g., Powell v. Texas*, 492 U.S. 680, 685 (1989); *Pawlyk v. Wood*, 248 F.3d 815, 825 (9th Cir. 2001) *cert. denied,* 122 S. Ct. 822 (2002) Petitioner acknowledges that his mmental health was at issue during the guilt phase of the trial. (See Objections at 10 "[Petitioner's] mental health status was in issue during the first guilt phase.").) Accordingly, the Court concurs with Judge Benitez's finding that the California Court of Appeal's decision was neither contrary to, nor involved an

unreasonable application of clearly established Supreme Court law.

B. The Sixth Amendment Prong.

In analyzing Petitioner's Sixth Amendment argument, Judge Benitez found the Supreme Court has not clearly addressed whether the Sixth Amendment right to counsel precludes the use of psychiatric testimony based on examinations conducted without notice to counsel and in order to ensure the physical safety of a suicidal detainee. (R&R at 7-10). Petitioner objects to Judge Benitez's finding, arguing That *Estelle*, *Satterwhite v. Texas*, 486 U.S. 249 (1988) and *Powell* held the right to counsel requires notice to counsel of a psychiatric examination and the purpose of the examination prior to allowing the results of that examination into evidence. Petitioner also cites Supreme Court cases recognizing an individual's right to counsel under the Sixth Amendment. (Objections at 9-10.)

Petitioner argues that Judge Benitez's analysis distinguishing this case from *Powell* was erroneous. First Judge Benitez found that the defendant in *Powell*, unlike Dustin did not assert an insanity defense during the guilt phase of the trial. (R&R at 9). Petitioner's objection is that during the guilt phase of the trial he asserted a diminished capacity defense. (Objections at 8, 10.) Petitioner fails to show how his diminished capacity defense makes his case analogous to *Powell*. In *Powell*, the Court focused on psychiatric testimony about the defendant's "future dangerousness" introduced at the sentencing phase of the trial. *Powell*, 492 U.S. at 680. Petitioner also argues that the general rule of *Estelle* "is not that the introduction of mental health evidence waives any objection to the prosecution's use of psychiatric evidence. See Estelle v. Smith, 451 U.S. 454 (1981). This is especially true of the Sixth Amendment objection. (Objections at 9.)

Petitioner maintains that where there is an immediate need for a psychiatric examination because a detainee is suicidal, "[t]he answer is the examination can take place if there is such a requirement for immediacy but the statements taken from the defendant and the result of the examination cannot be introduced into evidence especially in light of Dustin participating in the examination by the prosecution psychiatrist Dr. Braff. If counsel had been notified prior to examinations done by Bowlus, Meloy and Haroun, he could have secured an agreement that the result of such examination would not be introduced into evidence or could have simply told his client not to participate in the examination." (Objections at 8.) Petitioner's "answer" to the issue is not supported by clearly established Supreme Court authority. That is precisely the problem highlighted by Judge Benitez: to be entitled to habeas relief, the Antiterrorism and Effective Death Penalty Act ("AEDPA")

in relevant part requires a Petitioner to show the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (emphasis added). Accordingly, Petitioner's objection does not require this Court to overturn Judge Benitez's finding that Petitioner has not shown the decisions of the California courts were contrary to or unreasonably applied clearly established federal law.

Finally, Petitioner objects to Judge Benitez's finding that the introduction of the psychiatric/psychological testimony was erroneous, such error was harmless. Under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), a constitutional error is harmless unless it had a substantial and injurious effect or influence in determining the jury's verdict. The California Court of Appeal found that even assuming arguendo that introduction of the jail doctors' testimonies

was erroneous, the record overwhelmingly supported Petitioner's guilt. (Answer Exh. A at 15-16.) In particular, the court stated that:

> There is overwhelming evidence from other numerous witnesses that Dustin intended to kill Heidi [his wife], and that the killing was the result of premeditation and deliberation. Dustin made repeated threats to kill Heidi. He specifically purchased another weapon (the .45 caliber handgun) 10 days before the murder, and used 2 guns to shoot her. He made funeral arrangements for himself and Heidi. In light of this evidence of premeditation, the testimony of Drs. Bowlus, Meloy and Haroun was harmless.

Id. AEDPA governs this Court's review of a state court's factual determinations. In particular, 28 U.S.C.§ 2254(e) requires federal courts to give great deference to the state court's factual findings. *Keating*, 191 F.3d at 1069. A Petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Petitioner contends that during the guilt phase of the

trial, the only prosecution witnesses regarding Defendant's mental state were Dr.s Bowlus, Meloy, and Haroun, and therefore their testimony was critical to a determination that the homicide was murder in the first degree as opposed to second degree or manslaughter. (Objections at 10-11.) Petitioner further notes that these doctors testified as to Petitioner's statements to them. Petitioner maintains that if the testimony of Drs. Bowlus, Meloy and Haroun had been excluded, the prosecution would not have had any mental health expert testimony in the guilt phase, [1] so the admission "had a substantial and injurious effect or influence on the jury's verdict." (Objections at 11.)

Petitioner's argument does not persuade this Court to overturn Judge Benitez's finding of no harmless error. As noted above, this Court must defer to the California appellate court's finding that even without consideration of the

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[1] Dr. Braff, a mental health expert for the prosecution, testified only in the sanity phase of the trial.

testimonies of Drs. Bowlus, Meloy, and Haroun testimonies, there was overwhelming evidence of Petitioner's premeditation and deliberation. Petitioner has not presented any persuasive argument that the other evidence presented regarding Petitioner's mental state would not have been sufficient to support his conviction for first degree murder.

Accordingly, Petitioner' objections to Judge Benitez's recommended disposition of the first claim for relief are **OVERRULED**.

III. Objections Regarding Second Claim for Relief: Whether the Trial Court Was Required to Conduct a Second Competency Hearing.

Petitioner's second claim for relief is that his right to a jury trial was invalid because he was incompetent, and no mental competency examination or mental competency hearing took place at the time of the waiver. Judge Benitez found Petitioner's argument unpersuasive, finding that

Petitioner did not cite any authority for the proposition that a competency hearing must take place within a certain proximity to a jury waiver for the waiver to be constitutionally valid. [2] Judge Benitez also rejected Petitioner's arguments that his mental health had deteriorated in the two months between the date he was found mentally competent to stand trial (August 23, 1995) and the date he waived his right to a jury trial. (October 17, 1995).

Petitioner objects to Judge Benitez's recommended disposition of this claim, arguing that in his Petition he states under penalty of perjury that he was incompetent at the time he entered his waiver of jury trial. (Objections at 12.) Petitioner further references letters from Patton State Medical Hospital doctors attached to his Petition that state he would require continued treatment to maintain competence to

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[2] In his objections, Petitioner states that he does not argue that a competency hearing must take place within a certain proximity to a jury waiver in order for the waiver to be constitutionally valid. (Objections at 14.)

stand trial. (Objections as 12-13.) Petitioner maintains that after returning to San Diego County Jail, he was never given any of the treatment the Patton State Medical Hospital doctors stated he would need, nor was he given the medication, treatment and diet recommended by those doctors. Petitioner further challenges Judge Benitez's deference to the state court's factual finding under 28 U.S.C. § 2254(e), stating that he should be given an evidentiary hearing to demonstrate the facts that support his claim of incompetence at the time of his jury waiver – i.e., to show that the requirements to maintain his competency set forth by the Patton State Hospital physicians were not followed by the San Diego County Jail. (Objections at 15-16.)

As an initial matter, Petitioner's suggestion that this Court must find his constitutional rights were violated because he signed the Petition under declaration of perjury attesting that he was incompetent at the time he waived his

right to jury trial is unpersuasive. While signing the Petition under penalty of perjury renders the Petition an affidavit, Petitioner cites no authority, nor is the Court aware of any, that suggests the incompetence of a petitioner can be established through a declaration by the petitioner himself regarding his competence at an earlier date. Second, the Court is not persuaded by Petitioner's argument that it should not defer, as required by 28 U.S.C. § 2254(e), to the state court's factual finding he was competent at the time he waived his right to a jury trial but rather should hold an evidentiary hearing.

Before AEDPA, federal habeas courts had discretion to hold evidentiary hearings, "subject to some judicially-created limitations on that discretion." *Baja v. Ducharme*, 187 F.3d 1075-1077-78 (9th Cir. 1999). :However, as amended by the AEDPA, 28 U.S.C. § 2254(e) now substantially restricts the district court's discretion to grant

an evidentiary hearing." *Id.* at 1077. "[A] district court presented with a request for an evidentiary hearing ... must determine whether a factual basis exists in the record to support the Petitioner's claim." *Id.* at 1078; *Bragg v. Galarza*, 242 F.3d at 1089. If the Petitioner has "failed to develop" a factual basis in state court, the federal habeas court "must deny a hearing unless the applicant establishes one of the two narrow exceptions set forth in § 2254(e)(2)(A)&(B)." *Id.* (quoting *Cardwell*, 152 F.3d at 337).

Here, Petitioner has not made the requisite showing under AEDPA to support his claim for an evidentiary hearing. Petitioner contends that he did not have an opportunity to present facts that would show he was incompetent at the hearing when he waived his right to a jury trial. (Objections at 15.) But he does not argue why he was unable to present these facts during his appeals and petitions

before the state courts, or that the state appellate courts failed to consider those facts. *See Bragg*, 242 F.3d 1089-90 (denying an evidentiary hearing because Petitioner failed to develop a sufficient record in state court to support his ineffective assistance of counsel claim; Petitioner should have requested an evidentiary hearing on appeal or on state habeas); *Baja*, 187 F.3d at 1077. Accordingly, Petitioner's objections to Judge Benitez's recommended disposition of his second claim for relief are **OVERRULED.**

IV. Objections Regarding Third Claim of Relief: Ineffective Assistance of Trial Counsel.

Petitioner's third claim for relief is that his trial counsel rendered ineffective assistance because he (1) did not ensure the complete transcript of the two prior trials was presented to the court, and (2) did not ensure that a mental competency hearing ordered by the court on October 11, 1995 was held before petitioner waived his right to a jury

trial. *Strickland v. Washington*, 466 U.S. 668 (1984) us the clearly established federal law as determined by the United States Supreme Court regarding ineffective assistance of counsel claims. Under *Strickland*, a defendant must show (1) counsel's performance was deficient, and 92) the deficient performance prejudiced his case. *Id.* at 687. Regarding the first prong, there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment in making decisions. *Id.* at 690. A Petitioner must rebut this presumption by showing that counsel's performance was outside the range of professionally competent assistance. Id. at 687. The Court must evaluate the reasonableness of counsel's performance "from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (*citing Strickland*, 466 U.S. at 689). In showing prejudice, the defendant bears the burden

of showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one which undermines confidence in the proceeding's outcome. *Id.*

Judge Benitez concluded that Petitioner failed to satisfy either element of the *Strickland* inquiry because he had not substantiated either that his trial counsel's actions were something less than sound trial strategy or that a different decision of the trial court would have resulted. (R&R at 13.) Petitioner objects to this finding, stating that his claim for ineffective assistance does not lend itself to a trial strategy analysis. Petitioner first lists the aspects of the case that were not before the trial court because of the missing transcripts. (Objections at 18-19.) He then argues that "[t]here can be no strategic reason for failing to insure that the trial court had all of the transcribed and recorded

testimony and evidence adduced at the two prior trials." (Objections at 20.)

Petitioner's argument is unpersuasive. First, the record reflects that at a hearing on October 27, 1995, Judge Revak had the entire transcripts for the guilt phase of the first trial: Judge Revak stated, "But do I have the entire guilt phase trial" to which defense counsel responded "Yes." (45 RT 7643-44.) Counsel noted that the court did not have the sanity phase from the first trial or transcripts from the second trial. (45 RT 7643-44.) Counsel noted that the court did not have the sanity phase from the first trial or transcripts from the second trial. (45 RT 7642.) However, the prosecution would deliver to the court the sanity phase from the first trial and defense counsel undertook to deliver the transcript of the second trial. (45 RT 7642-43.) On January 5, 1996, Judge Revak indicated he had received and reviewed the transcripts from the first guilt and sanity trials, but not the transcripts of

the second sanity trial and therefore rendered its decision on Petitioner's guilt, but continued the matter for a week on the sanity issue. (1RT at 1-2, 37.) On January 9, 1996, Judge Revak confirmed he had read the transcripts from the second sanity proceeding, and rendered his decision as to sanity. (1 RT 38, 78.) Further, Petitioner fails to present any persuasive argument supported by authority suggesting that the alleged missing transcripts prejudiced him. The only argument he raises is that the transcription of audio cassette tapes or the tapes themselves of counseling sessions with Pastor Warman "are particularly important in that they show the petitioner's mental state from May 1995 up to the week prior to the homicide." (Objections at 19.) This argument is unpersuasive because Pastor Warman testified during the guilt phase of dustin's first trial about his interactions with Petitioner. (10 RT 1978-2006), and therefore the trial court reviewed his testimony by reviewing transcripts of his first

trial. Accordingly, the Court concurs with Judge Benitez's finding that Petitioner has not shown an ineffective assistance of counsel claim based on counsel's alleged failure to ensure all the transcripts were before the trial judge.

Judge Benitez also rejected Petitioner's second argument for ineffective assistance of counsel, finding that petitioner had not shown that an additional mental competency hearing two months after the initial hearing would have had a different result. Petitioner objects to this conclusion, stating that he would not have waived jury trial if he had been competent. In support, he cites a minute order dated October 11, 1995 and the Court proceedings on October 17, 1995. He then argues that "[i]f a competency hearing had been held on [October 17, 1995], the defendant would have been found to be incompetent and not capable of waiving his rights." (Objections at 21.) Petition's assertion is conclusory and unsupported by any facts. Petitioner's

citation to the October 11, 1995 minute order that states a "PC 1368 trial" was continued to October 17, 1995, does not suggest that the judge presiding over that hearing – Judge Webber – at the October 11, 1995 hearing doubted Petitioner's mental competency, and Petitioner does not reference any portion of the record other than the minute order itself indicating that Judge Webber doubted his mental competency or ordered a mental competency determination.

Having carefully reviewed the record, the Court does not find support for Petitioner's assertion that Judge Webber ordered a competency hearing. Judge Webber, who presided over the October 11, 1995 hearing, was only involved in trailing the case three times – on October 2, 10 and 11, 1995. On October 2, 1995, the minute order reflects the case was on trial call, would be continued to October 10, 1995, and would receive priority. (4 CT 932.) The minute order dated October 10, 1995, shows that Petitioner was present, the

action remained on trial call, and continued to October 11, 1995. (4 CT 935.) The October 11, 1995 minute order indicated the matter was continued to October 17, 1995, but referenced the trial as a "PC 1368 trial." (IV CT 936.) The minute order itself does not indicate Judge Webber ordered a competency hearing.

Further, the record reflecting the October 17, 1995 proceedings before Judge Reval – the Judge who conducted the court trial on Petitioner's guilt and sanity – reveals the absence of any determination that Judge Weber had doubted Petitioner's mental competency the week before or ordered a mental competency examination. (45 RT 7603-14.)

Accordingly, the Court agrees with Judge Benitez's finding that Petitioner's claim for ineffective assistance of counsel does not warrant habeas relief, and Petitioner's objections to Judge Benitez's recommended disposition of this claim are

OVERRULED.

V. Objections Regarding Fourth Claim of Relief: Petitioner Did Not Receive the Court Trial Upon Which He Conditioned His Waiver of Jury Trial Because the Trial Judge Did Not Have the Entire Transcript form the Two Prior Trials:

Petitioner's fourth claim for relief is that he "did not receive the court trial upon which he conditioned his waiver of jury trial and the concomitant rights associated with a jury trial because the trial judge did not have the entire transcript from the two trials upon which to base his decision." Judge Benitez found that Petitioner had not alleged his waiver had been coerced. (R&R at 14.)

Petitioner first objects to Judge Benitez's finding that Petitioner had not alleged his waiver of the right to jury trial had been coerced. In support, Petitioner argues that his waiver of the right to a jury trial was coerced is supported by

facts outlined in support of his second claim for habeas relief. The facts he cites are that he was advised if he had a jury trial he would remain at the county jail and forego psychiatric treatment during the entire period of the trial. (Objections at 22; *see* Petition, Supporting Facts for Ground 2.) Petitioner's objection in unpersuasive. First, Petitioner's claim for relief at issue - the *fourth* claim – is that he did not receive the court trial upon which he conditioned his waiver of jury trial and all the concomitant rights associated with a jury trial because the trial judge did not have the entire transcripts from the two prior trials upon which to base his decision." (*See* Petition, Ground 4.) Accordingly, the facts he cites are unrelated to his claim for relief – that he did not knowingly wive his right to jury trial because he was mentally incompetent, no mental competency hearing had taken place, and the mental competency hearing ordered by the trial court had not taken place. *(See* Petition Ground 2.)

Petitioner's contention that Judge Benitez should have construed one paragraph contained in his second claim for relief as support for his fourth claim for relief is not well-taken. Although pleadings of pro se litigants are liberally construed, *Eldridge v. Block*, 832 F2d 1132, 1137 (9th Cir. 1987), Petitioner has been represented by counsel throughout this habeas proceeding. Accordingly, the Court declines to find error in Judge Benitez's finding Petitioner did not allege his waiver of his right to a jury trial was coerced, particularly in light of the manner in which Petitioner phrased his fourth claim for relief.

Petitioner next objects to Judge Benitez's findings that Petitioner did not present any evidence showing that certain transcripts were in fact not considered by the trial judge and to Judge Benitez's finding that Judge Benitez 's finding that Petitioner's allegations he did not receive the trial he "bargained

for" was unsupported. In support, Petitioner states that his Petition, signed under penalty of perjury, constitutes an affidavit by him attesting that he agreed to waive his rights based on the agreement Judge Revak would make a decision based on all the testimony from the two prior trials. (Objections at 25.) Petitioner also states that the trial judge failed to consider all of the evidence from the prior proceedings, and lists the portions of the transcripts he contends were missing. *Id.* at 23-24. Petitioner's argument is unpersuasive. As discussed above, the record reveals that the trial court was provided with and read the relevant transcripts of the prior guilt trial and two sanity trials before rendering his decision. (45 RT 7642-44; 1 RT 1-2, 38.) Accordingly, his claim is unsupported by the record, and Petitioner's objections to Judge Benitez's recommended disposition is this claim are **OVERRULED.**

VI. Objections Regarding Fifth Claim of Relief; Ineffective Assistance of Appellate Counsel.

Judge Benitez stated that Petitioner's fifth claim for relief is that he was denied effective assistance of appellate counsel because counsel failed to ensure there was a complete record of

the trial proceedings for appellate review. Petitioner objects to this statement, arguing that the bases for his claim of ineffective assistance of appellate counsel are that appellate counsel failed to ensure there was a complete record of the trial proceedings for appellate review, a complete review of the record by appellate counsel would have revealed the lack of record upon which the trial judge had agreed to base his decision, and that all of the reporter's transcripts pertaining to Petitioner's mental competency determinations before Judge Knoepp are missing. Petitioner contends the transcripts relating to Judge Knoepp "would have provided a

demonstrable basis and background in determining what became of Judge Weber's Penal Code § 1368Order of October 11, 1995." (Objections at 28.) Thus, Petitioner argues that by failing to recognize he did not have the entire record upon which the trial judge had agreed to base his decision, the appellate counsel failed to raise a claim that trial counsel was ineffective by failing to ensure the complete record was before the trial judge.

Petitioner also argues that by failing to recognize he did not have the entire record, appellate counsel did not determine whether a mental competency hearing pursuant to California Penal Code section 1368 was held or the Petitioner's competency determined prior to any waiver of jury trial and its concomitant rights.

The standard for assessing the performance of appellate counsel is the same as that for trial counsel. *Morrison v. Estelle*, 981 .2d 425, 427 (9th Cir. 1992).

Accordingly, the Court applies the *Strickland* test outlined above, requiring Petitioner to show counsel's performance was deficient, and that this deficient performance prejudiced the Petitioner. *Id.* The Court agrees with Judge Benitez that Petitioner has not established either prong of the *Strickland* test. First the record indicates that appellate counsel made reasonable efforts to ensure the record on appeal was before the Court of Appeal. (Supp. CT at 4.) Further appellate counsel's decision to focus solely on the *Estelle* issues on appeal is a matter of strategy that this Court must defer to. See *Featherstone v. Estelle*, 948 F.2d 1497, 1507 (9th Cir. 1991). Accordingly, the Court concurs with Judge Benitez's finding that petitioner has not established the first prong of the *Strickland* test.

Regarding *Strickland*'s second prong, the Court also agrees that t Petitioner has failed to show prejudice. As discussed above regarding Petitioner's third claim for relief,

the record does not support Petitioner's assertion that Judge Webber doubted Petitioner's mental competency or ordered a mental competency examination. (*See supra* section IV.) Accordingly, Petitioner cannot show prejudice flowing from failure to raise on appeal Petitioner's competency when he waived his right to a jury trial and ineffective assistance of counsel based on failure to pursue a mental competency hearing in light of the October 11, 1995 minute order. Petitioner's objections to Judge Benitez's recommended disposition of this claim are therefore **OVERRULED**.

CONCLUSION

For the foregoing reasons, having carefully considered the record , applicable law, and good cause appearing, **IT IS HEREBY ORDERED** that Petitioner's objections to Judge Benitez's R&R are **OVERRULED** and the R&R is **ADOPTED** in its entirety. Accordingly, the Petition for writ of habeas corpus is **DENIED** for the reasons

set in Judge Benitez's R&R and in this order.

IT IS SO ORDERED

dated: 3/15/02 _____

M. JAMES LORENZ
UNITED STATES DISTRICT JUDGE

COPY TO:

HON ROGER T. BENITEZ
UNITED STATES MAGISTRATE JUDGE
ALL PARTIES/COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DOUGLAS F. DUSTIN,	)	Civil No. 00cv1441-L(BEN)
Petitioner,	)	REPORT AND RECOMMENDATION FOR DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS
v.	)	
ANA M. RAMIREZ PALMER, Warden,	)	
Respondent	)	

INTRODUCTION

Petitioner, DOUGLAS F. DUSTIN, a state prisoner represented in the case at bar by Mr. Frank J. Ragen, Esq., was convicted of first degree murder and sentenced to a prison term of 27 years to life. Mr. Dustin now seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254 alleging five grounds for

relief. This Court has reviewed all of the pleadings and relevant exhibits submitted and, for the reasons set forth below, recommends that the petition for writ of habeas corpus be **DENIED**.

BACKGROUND

The facts that follow are taken from the California Court of Appeal opinion in People v. Dustin, No. D026025 (April 19, 1999).[1] On November 25, 1987, Dustin was charged with first degree murder with the use of a firearm for shooting and killing his wife of 24 years. Dustin eventually entered a

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1. This Court relies upon the these facts pursuant to 28 U.S.C. § 2254(e). See Parks v. Rale, 506 U.S. 20, 35-36 (1992) (questions of historical fact, including references properly drawn from such facts are entitled to statutory presumption of correctness; Sumner v. Mata, 449 U.S. 539, 545-47 (1981) (deference is owed to findings of both state trial and appellate courts); Tinsley v. Borg, 895 F.2d 520, 524-26 (9th Cir. 1990) (factual findings of both state trial and state appellate courts are entitled to presumption of correctness on federal habeas review); see also Ford v. Ahitow, 104 F.3d 926, 939 (7th Cir. 1997) (federal habeas court "cannot choose the evidence it prefers to emphasize or make its own credibility determinations.").

plea of not guilty by reason of insanity. On March 17, 1989 a jury found Dustin guilty of the murder charge. During the sanity phase, a hung jury resulted in a mistrial. A second sanity trial also produced a hung jury and a mistrial. Dustin then sought and eventually won a new trial for both the guilt and sanity phase. Prior to the commencement of the new trial, however, a Superior Court judge ordered a competency hearing pursuant to § 1368 of the California Penal Code. On August 23, 1995, the court found Dustin mentally competent to stand trial. On October 17, 1995 Dustin waived his right to jury trial and stipulated to have the court decide both guilt and sanity based upon the record of the prior trials.

The Honorable Bernard E. Revak after reviewing the record from the prior trials found Dustin guilty of first degree murder and found true the firearm-use allegation in the guilt phase. Judge Revak then determined Dustin to be sane. (Cal. Ct. App. Opinion at 2-3.) Dustin was sentenced to a total of 27

years to life in state prison.

Dustin now seeks federal habeas relief asserting five claims: (1) that his Fifth and Sixth Amendment rights were violated when statements taken by jail psychiatrists and a jail psychologist were introduced into evidence at trial after his attorney specifically asserted his Fifth and Sixth Amendment right; (2) that the court was required to conduct a second competency hearing before permitting him to waive his right to a jury trial; (3) that he received ineffective assistance of trial counsel; (4) that he did not receive the court trial upon which he conditioned his waiver of jury trial because the trial judge did not have the entire transcript from the two prior trials upon which to base his decision; and (5) the he received ineffective assistance of appellate counsel. Dustin has exhausted his state remedies,[2] (Respondent's Answer at 2), and his Petition is timely.

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[2] Dustin's state habeas petitions were summarily denied by the California Supreme Court.

SCOPE OF REVIEW

The Provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") apply to petitions for writs of habeas corpus filed in federal court after April 24, 1996. Lindh v. Murphy, 521 U.S. 320 (1997). Since Dustin filed this case on July 20, 2000, AEDPA applies.

Title 28 United States Code § 2254(a), sets forth the following scope of review for federal habeas claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court judge shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a)(emphasis added).

A federal habeas corpus petition must allege a deprivation of one or more federal rights to present a cognizable claims pursuant to § 2254. A state's interpretation of its laws or rules provides no basis for federal habeas corpus

relief because no federal constitutional question arises. Estelle v. McGuire, 502 U.S. 62, 68 (1991) (federal habeas corpus relief does not lie for errors of state law, and federal courts may not reexamine state court determinations on state law issues).

Instead under the AEDPA a petitioner must satisfy 28 U.S.C. §2254(d)(1) or (2) in order to merit habeas relief. As amended by AEDPA, 28 U.S.C. § 2254(d) reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody, pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"[T]o obtain federal habeas relief, [a petitioner] must first demonstrate that his case satisfies the condition set by § 2254(d)(1)." Williams v. Taylor, 120 S. Ct. 1495, 1518 (2000). The Supreme Court interprets § 2254 (d)(1) as follows:

> Under the "contrary to" clause a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle form this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 120 S. Ct. at 1523.

Similarly, when reviewing a state court's factual determination, federal courts normally defer to state court findings. As amended, § 2254(c)(1) provides: "[A] determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1); see also n.1,

supra. Under § 2254(e)(1), federal courts must "give great deference to the state court's factual findings," and a petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence." Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), cert. denied, 522 U.S. 1008 (1997).

PETITIONER'S CLAIMS

The instant petition sets forth five grounds for relief. Each will be addressed in order.

1. The Fifth and Sixth Amendment Claim

Dustin's first claim for relief has two prongs in that he claims both his Fifth and Sixth Amendment rights were violated. Th Fifth Amendment, of course, protects an accused's right to remain silent rather than incriminate himself while the Sixth Amendment ensures an accused's right to counsel at critical stages of the proceedings.

Shortly after Dustin's surrender and booking, Dustin

was questioned by jail mental health professionals, whithout notice to counsel or the presence of counsel, but after his attorney had specifically asserted his fifth and sixth amendment rights. The opinions of the mental health professionals regarding Dustin's sanity were later introduced into evidence at trial, over Dustin's objections.[3] Thus Dustin's claims fall

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[3] It is undisputed that on September 14, 1987, Dustin, accompanied by his attorney, surrendered to police authorities. Dustin asserts that upon his surrender, his attorney told the police not to question him unless counsel was present. There is some ambiguity as to whether Dustin's counsel did, in fact, invoke those rights on Dustin's behalf. During the trial on September 24, 1992 Dustin's attorney at the surrender, Mr. Patrick Murphy testified:

> Q. When you went to the Covina Police Department, did you tell them not to question him?
>
> A. I don't explicitly recall, but I would presume I did. That would be my normal practice. I would advise any client to invoke the 5th.

Lodgement No. 1, RT at 5302:7-11. However approximately eight months later Mr. Murphy submitted a declaration (dated May 11, 1993) to the trial court. The same declaration is put forth with the instant Petition for habeas relief as "Exhibit A." In this more recent declaration, Mr, Murphy recalls the surrender more vividly. He states,

On Dr. Dustin's behalf, as his counsel, in his presence and with his consent, I advised San Diego Police Officers that Dr.

into the category of trial-type errors as opposed to the category of structural errors. See Brecht v. Abrahamson, 507 U.S. 619, 629 (1993). When the state courts have analyzed a constitutional error for harmlessness under Chapman v. California, 386 U.S. 18 (1967), as did the California Court of Appeal on this Dustin's Fifth and Sixth Amendment claim, a federal district court on habeas review must analyze harmlessness under the standard set forth in Brecht. 507 U.S. at 623, 637.

Harmless error analysis comes into play only after a constitutional error has been identified. In the case at bar, Dustin has not made the threshold demonstration that the

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Dustin was invoking his rights to remain silent and to counsel. I elicited from San Diego Police Officers a specific promise that no one would interview my client, Dr. Douglas Dustin, unless it was in my presence as his attorney. Exhibit A, Declaration of Patrick Murphy at ¶ 5. The ambiguity need not be resolved at this juncture. The claim cannot stand even if one assumes, for the sake of argument, that the attorney's invocation of Dustin's rights, did in fact, occur.

introduction of the mental health testimony was a constitutional error under either the Fifth or the Sixth Amendments.

The starting point for our analysis is the decision of the California Court of Appeal, which states in pertinent part:

> The United States Supreme Court has noted that the Fifth Amendment does not prohibit the use of a defendant's statements made without Miranda warnings during a court-ordered or court approved mental examination, so long as they re offered in rebuttal to a defendant's insanity defense on the issue of the defendant's state of mind at the time the offense was committed. (Estelle v. Smith, 451 U.S. [454] at p. 465.).... The court in Buchanan [v. Kentucky, 483 U.S. 402 (1987) held the introduction of statements made during a psychological evaluation conducted without Miranda warnings for that limited rebuttal purpose did not constitute a Fifth Amendment violation.... Here, apart from his plea of not guilty by reason of insanity, Dustin specifically put his mental state in issue during the guilt phase of trial. He presented his own psychologist and psychiatrists to testify on his mental state at the time of the killing .... Under these circumstances, the prosecution was entitled to rebut his presentation with testimony from experts who evaluated his mental state.

Exhibit A to Answer to Petition, at 13-14 (hereinafter referred

to simply as "Cal. Ct. App. At ___".)) We now review each prong separately.

A. The Fifth Amendment Prong

Dustin bottoms his Fifth Amendment argument on Estelle v. Smith, 451 U.S. 454 (1981). Estelle sets forth the general rule that the Fifth Amendment normally bars the government from subjecting a defendant to a psychiatric examination without first warning him of his constitutional rights. The U.S. Supreme Court created an exception to its Estelle rule in Buchanan v. Kentucky, 483 U.S. 402 (1987), where it explained that when a defendant puts his mental condition in issue, he waives his Fifth Amendment rights as to the evidence of his mental condition.

Dustin acknowledges the Buchanan exception but argues that his facts are sufficiently different to fall outside the Buchanan exception. Dustin claims,

> . . . [I]t is for two ... reasons that Buchanan is inapposite to the case at bar. First, 'Buchanan's

> counsel joined in a motion for the psychiatrist's examination for involuntary hospitalization.' Second, the Buchanan psychiatrist only 'set forth his general observations about the mental state of Buchanan but had not described any statements by Buchanan dealing with the crimes for which he was charged.' In the case at bar, petitioner did not request the examination of Drs. Bowlus, Meloy and Haroun, and the testimonies of Drs. Bowlus, and Meloy contained detailed statements by petitioner detailing the crime for which he was charged.

Memorandum of Points and Authorities in Support of Traverse, at 3 (citations omitted). This Court finds that the California Court of Appeal decision, finding that Dustin waived his Fifth Amendment rights by putting his sanity in issue, was not contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. In other words, there was no constitutional error. Accordingly, the Fifth Amendment prong of Dustin's first claim does not merit habeas relief.

B. The Sixth Amendment Prong

Turning now to the Sixth Amendment prong of Dustin's

first claim, it appears that the federal law is not as clear. In Powell v. Texas, 492 U.S. 680 (1989), the U.S. supreme Court held that the Sixth Amendment right to counsel was violated when a psychiatric exam was conducted without notice to a defendant's attorney. [4] In the case at bar, there is no dispute that Dustin was examined in the jail on three occasions shortly after his surrender. These examinations took place outside his counsel's presence and without notice to counsel. However, Dustin's open contemplation of suicide while in the jail was the sole triggering factor leading to the examinations.

The touchstone for reviewing Dustin's Sixth Amendment claim is, again, the relevant state court decision(s). The California Court of Appeal found the following facts, in pertinent part:

> Early in the morning of September 14, 1987, Dustin accompanied by his attorney,

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[4] The supreme court noted that the state court had improperly conflated the Fifth and Sixth Amendment analyses. 492 U.S. at 683.

> surrendered. . . . That evening, Dustin was taken from jail to a San Diego county mental health facility to be examined by a psychiatrist after telling jail personnel he was contemplating suicide. .Psychiatrist Lee Bowlus performed mental status and psychiatric examinations on Dustin to evaluate his suicide risk and 'to make sure Dustin did not try to kill himself while in custody.'
>
> . . . the next morning, Dustin was examined by John Meloy, a psychologist . . . Dr. Meloy regularly evaluated the inmates placed in safety cells, and did so with Dustin, who was considered a suicide risk.
>
> . . . On September 16, 1987, Dustin was examined by another psychiatrist, Ansar Haroun to determine whether Dustin had a psychiatric disorder and whether he was suicidal.

Cal. Ct. App., at 6-8. In addition, the state court found:

> Moreover substantial evidence supports the court's finding that the mental health professionals who interviewed Dustin wer not agents of the court or of law enforcement . . . . Dustin was examined by Drs. Bowlus, Meloy, and Haroun because he expressed a desire to kill himself, and they interviewed him to determine whether it was necessary to protect him from doing so by placing him in the psychiatric security unit . . . There is no evidence that they acted in order to obtain incriminating information, or provided such information to law enforcement.

Id. at 14-15.

1. The Law is Not Clearly Established

Recalling that the AEDPA requires a conviction *in*consistent with "clearly established federal law, as determined by the Supreme Court of the United States" as a prerequisite for habeas relief, it is necessary to review the decisional law on Sixth Amendment protections where psychiatric exams are involved. The U.S. Supreme Court on three occasions has commented on various intersections of the Sixth Amendment and psychiatric exams. First, in Estelle v. Smith, 451 U.S. at 469-471, the Court held that an indicted capital murder defendant has a sixth Amendment right to have the assistance of counsel in deciding whether to submit to a pretrial psychiatric examination.[5] Later, in Satterwhite v.

[5] While the Court recognized the right to have counsel assist in deciding whether to under go a psychiatric exam, the Court noted that there was no constitutional right to have counsel present during the examination. Estelle, 451 U.S. at n. 14.

Texas, 486 U.S. 249, 255-256 (1988), the Court reaffirmed that in a capital murder case, a defendant has a right to have his counsel given notice of an ordered psychiatric exam.

Most recently, the Court visited the subject in Powell v. Texas, 492 U.S. 680 (1989). Powell also concerned a capital murder charge. On the day of his arrest, the prosecutor requested, and the trial court ordered, the defendant undergo a psychiatric examination on three issues: competency to stand trial, sanity at the time of the offense, and future dangerousness. Id. at 681-682. Neither the defendant nor his attorney were given notice that the issue of future dangerousness would be an aspect of the exam. Id. at 682. The mental health opinions on future dangerousness were eventually offered at the defendant's sentencing hearing, and the defendant was sentenced to death. Id. In this context, the Court reversed the conviction "because the evidence of future dangerousness was taken in deprivation of . . . [the] right to the assistance of counsel" and there was no

Sixth Amendment waiver. Id. at 686.

The Court in Powell explained:

> While it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to require the state to provide counsel with notice before examining the defendant concerning future dangerousness.

492 U.S. at 685. Powell focused only upon psychiatric testimony about "future dangerousness," a capital punishment sentencing phase concern. Powell did not address psychiatric testimony concerning an accused's sanity at the time of the offense.[6] Estelle had already covered that ground in terms of Fifth Amendment analysis without addressing implicated Sixth Amendment rights. The Supreme Court has never addressed the Sixth Amendment right to counsel in the context of a suicide watch-triggered mental exam. Certainly, if a detainee

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[6] Footnote two of Powell explains, "We therefore have no occasion to address whether a waiver of the right to object to the use of psychiatric testimony at the guilt phase of a capital trial extends to the sentencing phase as well. Id. at 683, n.2.

indicates he is suicidal, immediacy of a mental examination may be critical. Stalling an examination until a Sixth Amendment notice can be given to the detainee's counsel may put the detainee in unreasonable jeopardy of his physical safety. In such a jail examination, in response to a psychiatrist's question about why it is that a subject feels suicidal, the subject may well detail the criminal deed he had just done or simply worry about his own loss of income/reputation. Even if there was time in such a scenario to notify counsel and time for counsel to discuss case strategy with a defendant prior to the examination, one wonders what options would remain. In any event, for purposes of habeas review, it is sufficient to say that the U.S. Supreme Court has not addressed the question of whether the Sixth Amendment right to counsel extends to the uncommon circumstances in Dustin's case.

Even putting aside the fact that the examinations of Dustin were triggered by his suicidal comments, the U.S.

Supreme Court has not analyzed the Sixth Amendment in a context similar to Dustin's. Estelle, Satterwhite and Powell, involved circumstances significantly different that those present in Dustin's case. The defendant in Powell, unlike Dustin, did not assert an insanity defense during th guilt phase of the trial. Dustin on the other hand, did put his sanity in issue. By putting his sanity in issue during the trial phase, it seems the trial court correctly applied the general rule of Estelle, id., objections to the prosecution's use of psychiatric evidence are automatically waived. Later on, unlike Powell, because there was no capital punishment element in Dustin's trial, there was no sentencing phase with issues and psychiatric evidence about Dustin's future dangerousness. Similarly, in Satterwhite, the issue was about testimony going to a defendant's future dangerousness in a capital sentencing phase. 486 U.S. at 254. The constitutional concern, Satterwhite explained, is that "for a defendant charged with a capital crime, the decision whether to submit to a

psychiatric examination designed to determine his future dangerousness is 'literally a life or death matter' which the defendant should not be required to face without the 'guiding hand of counsel.'" Id. (quoting Estelle, 451 U.S. at 471). That would not be the case for an insanity defense to a non-capital crime. In Estelle, the accused did not raise an insanity defense. 451 U.S. at 457, n. 1.

Estelle, Satterwhite, and Powell each involved a capital sentencing phase where the examining psychiatrists were permitted to testify about the defendant's future dangerousness. In Estelle, Satterwhite, and Powell, each exam occurred at the behest of the trial court or the prosecution. Similarly, neither the Satterwhite opinion nor the Powell decision make any comment upon the use of psychiatric testimony to determine sanity at the time an offense is committed.

A thorough search of the decisions of the lower federal courts reveals that no court has published an opinion addressing

circumstances similar to Dustin's where uncounseled mental health examinations were triggered by the defendant's suicidal tendencies.[7] In other words, where a defendant puts his sanity in issue during the guilt phase of a criminal trial, there is no

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[7] The Eleventh Circuit in Delguidice v. Singletary, 84 F.3d 1359, 1363-1364 (1996) found a Sixth Amendment violation where the prosecution offered psychiatric testimony in opposition to an insanity defense arising from a psychiatric exam which had taken place without adequate notice to defense counsel. The exam was to focus on defendant's competency to be sentenced and was conducted pursuant to court order. Id. at 1361. In contrast, the Fifth Circuit in Penry v. Johnson, 215 F3d 504, 511-512 (2000), found no Sixth Amendment violation when a competency examination gave rise to later psychiatric testimony on the issue of defendant's sanity at the time of the offense. The Fifth Circuit recounted the state court's conclusion that defendant's attorney was 'on notice that if he intended to put on a mental status defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal.' Id. at 512. The Fifth Circuit then applied the AEDPA standard for habeas relief and concluded that the state decision was "not contrary to, nor an unreasonable application of, clearly established federal law." Id.

There are few decisions specifically addressing the Sixth Amendment issue which do not conflate both Fifth and Sixth Amendment rights. The few that do exist are anything but settled. See 21A Am.Jur. 2d Criminal Law § 1220 (1998) (authority exists for both views).

clearly established constitutional right to exclude psychiatric testimony based upon examinations conducted without notice to counsel and in order to insure the physical safety of a suicidal jail detainee. Thus, Dustin has failed to demonstrate a right to federal habeas relief as specified by § 2254(d). Put differently, Dustin has not shown that the decisions of the California courts were contrary to or unreasonably applied clearly established Federal law.

2. The Error, If There Was One, Was Harmless

Even if the psychiatric/psychological testimony was allowed into evidence in violation of Dustin's Sixth Amendment right, the outcome of his request for federal habeas relief would be no different, for the error (if there was one) was harmless.[8] According to Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), constitutional error is harmless unless it had a

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[8] It is important to note, that a Sixth Amendment violation of this type is to be analyzed in terms of harmless error rather than by applying an automatic rule of reversal. Satterwhite, at 256-257.

substantial and injurious effect or influence in determining the jury's verdict.[9]

In this vein, it is significant that the California Court of Appeal found that "[t]here is overwhelming evidence from other numerous witnesses that Dustin intended to kill Heidi [the victim], and that the killing was the result of premeditation and deliberation." Cal. Ct. App. at 16. This Court's own review of the trial transcript admits the same conclusion. Further, concerning Dustin's sanity at the time of the murder, the prosecution put on testimony from and additional examining psychiatrist, Dr. David. L. Braff, chief of psychiatric services and professor at the University of California at San Diego Medical Center. Braff's testimony was consistent with, and as reasonable as, that of the three jail psychiatrists/psychologists who also testified concerning

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[9] The Ninth Circuit now applies the Brecht analysis in all habeas cases brought under § 2254. Bains v. Cambra, 204 F.3d 964, 977 (9th Cir. 2000)

Dustin's sanity. Lodgment No. 19, RT 3544-3609, Lodgment No. 38, RT 6147-6246. Consequently, this Court does not find that the Sixth Amendment error (if any) had a substantial injurious effect or influence in determining the trial court's verdict of guilt and sanity. Therefore the Sixth Amendment prong of Dustin's first claim for habeas relief must also fail.

B. Claim Two - That the Court Was Required to Conduct a Second Competency Hearing Before Permitting the Petitioner to Waive His Right to a Jury Trial

For his second basis for relief, Dustin claims that the trial court should have held a more up-to-date competency hearing prior to allowing him to waive his right to a jury trial. Certainly, under Pate v. Robinson, 383 U.S. 375, 385 (1966), an accused is entitled to a competency hearing where there is evidence to raise a bona fide doubt as to his competence to stand trial. Accordingly, if a reasonable judge, based upon the

evidence before him, would have found a bona fide doubt of competence, a competency hearing is in order. Torres v. Prunty, 223 F.3d 1103, 1108 (9th Cir. 2000) (no competency hearing ever held in spite of evidence.

In Dustin's case a competency hearing was, in fact, held. According to the California Court of Appeal, "Dustin had been found mentally competent to stand trial on August 23, 1995, prior to his jury waiver on October 17, 1995. Cal. Ct. App. at 17. Dustin remonstrates that in the intervening two months, his competency may have declined to the point of being incompetent on the day of his waiver. Dustin then catalogs a host of mental health findings and medication and dietary problems he was apparently experiencing at the time (many de hors the record), and argues that he was entitled to a more recent competency hearing. Dustin's Memorandum of Points and Authorities at 13-18. Traverse at 4-8. Dustin does not cite authority for the proposition that a competency hearing

must take place within a certain proximity to a jury waiver in order for the waiver to be constitutionally valid. On the other hand, the state court of appeals found "[t]here is no evidence that by the time of the hearing in which he waived his right to a jury, his mental competence ha changed." Cal. Ct. App. at 17. At the time of his jury trial waiver, Dustin was "in possession of his faculties, understood the nature of the proceedings and understood that he had an absolute right to a jury trial." Id. These findings of fact are entitled to a presumption of correctness under § 2254(e). See n.1, supra. Against this backdrop, there is no basis fro granting federal habeas relief under Dustin's second claim must be denied.

III. Ineffective Assistance of Trial Counsel

For his third claim, Dustin asserts that his trial counsel rendered ineffective assistance because he (a) "did not ensure the complete transcript of the two prior trials was presented to the court"; and (b) "did not ensure the Penal Code § 1368

hearing was resolved before petitioner waived his right to a jury trial." Memorandum of Points and Authorities in Support, at 20.

To substantiate his claim, Dustin must show that his attorney's representation fell below and objective standard if reasonableness. Strickland v. Washington, 466 U.S. 668, 688 (1984). He must also prove he was prejudiced by demonstrating a reasonable probability that but for his counsel's errors, the result of the proceeding would have been different. Id. at 694.

Under the second component, Dustin must demonstrate his counsel's error rendered the result unreliable or the trial fundamentally unfair. Fretwell v. Lockhart, 506 U.S. 364, 372 (1993); Strickland , 466 U.S. at 6944. Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. United States v.

Ferreira-Alameda, 815 F.2d 1251, 1253 (9th Cir. 1987); see Strickland v. Washington, 466 U.S. at 690; Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985).

Dustin must prove both elements. A court may reject his claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. Strickland v. Washington, 466 U.S. at 697. Unsupported conclusory allegations that an attorney's performance was substandard are not sufficient to show prejudice. United States v. Popoola, 881 F.2d 811, 813 (9th Cir. `989).

As to Dustin's claim that counsel's performance was substandard for failing to ensure the trial judge had all of the prior transcripts, the claims are unsupported and conclusory. Dustin supplies no declaration from his trial counsel nor evidence of any other sort to undercut the strong federal presumption that counsel exercised sound trial strategy. Morris v. California, 966 F.2d 448, 456 (9th Cir. 1991). The record

need not determine the actual reason for an attorney's actions, as long as the act falls within the range of reasonable representation. Id. at 456-57. There are many reasons why counsel may properly choose to include or exclude evidence in a trial based upon stipulations. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Hill v. Lockhart, 474 U.S. 52, 58 (1985). For this allegation, Dustin has failed to satisfy either element of the Strickland inquiry. Dustin has substantiated neither that his trial counsel's actions were something less than sound trial strategy nor that a different decision of the trial court would have resulted. Accordingly, this aspect of Dustin's third claim must fail.

The second aspect of Dustin's ineffective assistance claim must fail for similar reasons. Something of a corollary to his earlier claim for relief, Dustin now claims that his trial counsel rendered ineffective assistance because his counsel did

not "follow through" and see that a second § 1368 hearing was held prior to Dustin's waiver of jury trial. The Strickland inquiry requires at least a showing of prejudice. Dustin has not made such a showing here. He has not shown that an additional mental competency hearing two months after the initial hearing would have had a different result. Accordingly, this Court need not reach the question of whether his trial counsel's performance was substandard or stellar. Therefore, the second aspect of Dustin's claim three also fails to meet the standard for federal habeas relief.

IV. Claim Four - that Petitioner Did Not Receive the Court Trial upon Which He Conditioned His Waiver of Jury Trial Because the Trial Judge Did Not Have the Entire Transcript from the Two Prior Trials

For his fourth claim, Dustin makes the curious argument that he "did not receive the court trial upon which he conditioned his waiver of jury trial and the concomitant rights associated with a jury trial because the trial judge did not have

the entire transcript from the two prior trials upon which to base his decision." A defendant may waive his right to a trial by jury where the waiver is made voluntarily, knowingly, and intelligently. Patton v. United States, 281 U.S. 276, 312, 313 (1930) (overruled on other grounds by Williams v. Florida, 399 U.S. 78, 92 (1970). Dustin raises no issue concerning the voluntariness, or knowing of his waiver. He alleges no coercion in the waiver. As a result of the two earlier trials, he certainly understood the what another jury trial would entail and what he was waiving. Rather he seems to argue that he would not have waived a third jury trial if he had foreseen that fragmentary gaps in the written record would exist in the materials finally delivered to the trial judge.

This claim is untenable. First, it must be noted that Dustin's petition simply asserts that various bench conferences and portions of testimony are missing from the appeal record. See Petition at unnumbered pages following "Ground Four."

In support, Dustin points to Exhibit M and describes it as being a court reporter certification to the effect that certain transcripts were lost. Yet, neither Exhibit M, nor any of the other exhibits, appear to be such a certification.

Second, Dustin apparently assumes that because the record on appeal is missing portions, the trial judge similarly was missing portions. Dustin fails to point to affirmative evidence that the trial judge was, in fat, missing the described portions. Instead, a review of the transcripts indicates that a good deal of time went into discussions between counsel and the court over the previously received evidence and what portions of the transcribed testimony the court was, or was not, to consider. See Lodgment Nos. 47 & 48. Neither counsel suggested that the court might not be in a position to rule due to still missing transcripts when the day came for the bench ruling. Lodgment 48.

Third Dustin's bald allegation that he did not receive

the trial he "bargained" for in exchange for his waiver is unsupported by affidavit or otherwise. Dustin offers no evidence that he would have made a different decision, that he would have demanded a third jury trial, had he known that some of these transcripts fragments would not have been in the hands of the trial judge deciding his case. If one analogizes the waiver of a right to jury trial to a guilty plea bargain, Dustin must at least demonstrate that the completeness of the transcript was an essential element of his waiver "bargain." E.g., Hill v. Lockhart, 474 U.S. 52, 58-60 (1985) (habeas petitioner did not allege in his petition that had he better understood his waiver he would have changed his plea and insisted on going to trial). Like the defendant in Hill, Dustin "alleged no special circumstances that might support the conclusion that he placed particular emphasis on "the absolute completeness of the record" in deciding whether or not to waive jury trial. Id. at 60. To the contrary, Dustin's waiver appears to be focused more on

simply avoiding another hung jury. The actual waiver colloquy is illustrative.

> The Court: Now, if you waive your right to a jury trial, then I'm the one that would decide by myself. Do you understand that"
>
> Dustin: Yes.
>
> The Court: Is that what you want to do?
>
> Dustin: Yes. We've had too many hung juries, and I believe a jury will never arrive at a decision in the sanity phase. This case has gone on far longer than I feel I can tolerate. I would like to bring it to a conclusion.

Lodgment No. 47 (RT vo. 45) at 7607:19-28. Dustin's fourth claim for federal habeas relief must fail.

V. Ineffective Assistance of Appellate Counsel

For Dustin's fifth and final claim for relief, he asserts that his appellate counsel rendered ineffective assistance because he did not "ensure there was a complete record of the trial proceedings for appellate review." See Petition at unnumbered page "Ground Five." To be clear, Dustin is not claiming that the appellate courts were presented with a record missing essential portions of the transcript upon which the trial court had relied. Instead, Dustin claims "the appellate attorney had the complete record upon which Judge Revak made his decision, but he did not have the entire transcript of the underlying trials which transcripts should have been received to see if error presents itself." Memorandum of Points and Authorities in Support, at 25. In essence, Dustin argues that had appellate counsel had the transcript fragments - fragments that were either missing before the trial court rendered its decision or missing after the decision - counsel would have *perhaps* been able to find reversible error. For example,

appellate counsel may have found claims two, three, and four presented in the instant habeas petition, or other "unidentified errors." Consequently Dustin takes his appellate counsel to task for raising only the Estelle v. Smith (Fifth and Sixth Amendment issues (addressed in claim one of the instant federal habeas petition on direct appeal.

The standard for assessing the performance of trial and appellate counsel is the same. Morrison v. Estelle, 981 F.2d 425, 427 (9th Cir. 1992); Miller v. Keeney, 882 F.2d 1428, 1433-34 (9th Cir. 1989). To prove prejudice, petitioner must demonstrate a reasonable probability that but for his counsel's errors, the result of the appeal would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984).

Dustin's petition satisfies neither element of the Strickland analysis for ineffective assistance claims. Having reviewed the same claims herein that Dustin argues his appellate counsel should have raised on appeal, it cannot be said that

appellate counsel's decision to focus solely on the Estelle issues was an unreasonable strategy. "Appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 120 S.Ct. 746, 765 (2000) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Thus, the first element is not met. Likewise, Dustin has completely failed to satisfy the second element of Strickland which requires a demonstration of prejudice, i.e., by showing how the appeal would have had a different result. As mentioned earlier, unsupported conclusory allegations are not sufficient to show prejudice. United States v. Popoola, 881 F.2d at 813. Therefore, Dustin's fifth claim for relief must be denied.

CONCLUSION AND RECOMMENDATION

For the reasons set forth above, this Court recommends that the District Court **DENY** Douglas F. Dustin's petition for writ of habeas corpus in its entirety.

This Report and Recommendation is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

IT IS ORDERED that no later than March 2, 2001, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than March 19, 2001. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Yist, 951 F.2d 1153 (9th Cir. 1991).

Dated: February 1, 2000

ROGER T. BENITEZ
United States Magistrate Judge

cc: Judge Lorenz
All Counsel of Record